Supreme Court, U.S.
FILED
AUG 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-124

In The

Supreme Court of the United States

October Term, 1989

o

United Air Lines, Inc., *et al.*,
Petitioners,

vs.

Board of Assessment Appeals of the State of Colorado, *et al.*,
Respondents.

o

On Petition For Writ Of Certiorari To The Colorado Supreme Court

o

Respondents' Brief In Opposition

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QUESTIONS PRESENTED

Expressed in the circumstances of this case, the question is:

> Whether § 532(b) of the Tax Equity and Fiscal Responsibility Act of 1982, codified at 49 U.S.C. App. § 1513 (d) (1982), which was signed into law on September 3, 1982, and prohibits state taxing authorities from taxing air carrier transportation property differently from other commercial and industrial property in the same assessment jurisdiction, is applicable to the 1982 Colorado property taxes assessed on the property of eleven airline companies and levied and collected by Colorado taxing authorities when the assessments were completed prior to the effective date of the federal statute and were made in accordance with existing Colorado law?

In the event certiorari is granted, then the respondents will raise the following issue as a defense:

> Whether the application of 49 U.S.C. , App. § 1513 (d) to the 1982 Colorado property tax year is constitutionally prohibited because such application is destructive of state sovereignty and violates the Tenth Amendment of the United States Constitution?

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The Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion by the Colorado Supreme Court. That opinion is reported at 773 P.2d 1033 (1989).

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 773 P.2d 1033 (1989). With this exception, the respondents adopt the petitioners statement about the earlier opinions contained in the petition for writ of certiorari.

JURISDICTIONAL STATEMENT

The Petitioners' contention that the Colorado State Board of Equalization could modify the valuation of their property for 1982 property taxes presents a jurisdictional issue. The Petitioners' contention was rejected by the Colorado Supreme Court. Assuming, for

purposes of argument, that the State Board Of Equalization could value the airline property, as contended by the Petitioners, then the Petitioners failed to exhaust the available remedy before the State Board of Equalization. The Petitioner made no protest to the State Board of Equalization between September 3, 1982 and September 21, 1982. The failure to timely exhaust this administrative remedy would be a jurisdictional defect requiring dismissal. *Hoffman v. Colo. State Bd. of Assessment*, 683 P.2d 783 (Colo. 1984)

STATEMENT OF THE CASE

Respondents believe the Petitioners' statement to be insufficient and, therefore, supply this statement. The Respondents adopt the statement of the facts by the Colorado Supreme Court at pages 1035-1039 of 773 P.2d and identified as section I of the Court's opinion. Furthermore, the parties agree that 49 U.S.C.App. § 1513(d) is binding on them for tax years after 1982. The resolution of the dispute in our case applies to one tax year, the 1982 property tax year in Colorado.

REASONS FOR DENYING THE WRIT

1. The problem in our case is not a recurring one and is important only to the immediate parties to our case.

The issue in our case is whether § 49 U.S.C.App. § 1513(d) applies to the 1982 property tax year in Colorado. The parties do not dispute that the statute is applicable for subsequent tax years. Indeed, the valuation of airline property for purposes of taxation has been in accordance with this federal statute for subsequent tax years.

The outcome of this case is important only to the parties. The Airlines statement that seven other Colorado counties will be affected is incomplete. The Colorado Supreme Court notes at page 1036 of 773 P.2d that the Airlines are requesting a tax refund of nearly $3,200,000 in our case alone. Therefore, the refunds from other counties would be a small sum.

The issue in our case is of limited application. The problem is a one time occurrence and is limited to the parties. The issue is not worthy of further consideration.

2. The validity of the federal statute is not in issue in our case.

The validity of federal law is not an issue in our case. The Colorado Supreme Court states at page 1039 of 773 P.2d that

> Nor is it disputed that 49 U.S.C.App. § 1513(d) is binding on the state of Colorado under the Supremacy Clause, U.S. Const. art. VI, for tax years subsequent to the effective date of the federal statute.

Airline property has been valued for property taxes in Colorado in accordance with 49 U.S.C.App. § 1513(d) for tax years beginning after the effective date of this federal statute. The Colorado Supreme Court and the parties recognize the validity of the federal statute.

3. The Colorado Supreme Court relied on the definition of assessment contained in the federal statute.

The decision of the Colorado Supreme Court is not in conflict with *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987). The opinion by the Colorado Supreme Court recognizes that the question in *Western Air Lines* is governed by federal law. 773 P.2d at 1043. In our case, the Colorado Supreme Court applied the definition of assessment contained in 49 U.S.C.App. § 1513(d)(2)(A).

The Colorado Supreme Court applied the federal statutory definitions. The federal statute defines assessment to mean "valuation for a property tax levied by a taxing jurisdiction" . In Colorado the valuation of the airline property was completed prior to the effective date of 49 U.S.C. App. § 1513(d). 773 P.2d at 1039-1043. See *Arkansas - Best Freight Systems, Inc. v. Cochran*, 546 F.Supp. 904 (M.D. Tenn. 1981) (Court construes Federal Motor Carrier Act of 1980, which prohibits assessment of motor carrier property at higher ratio to true market value than ratio applicable to other commercial and industrial property, as applicable to all assessments actually made after the effective date of federal statute.)

The decision of the Colorado Supreme Court implements the purposes and policies of 49 U.S.C.App. § 1513(d). The Court and the parties recognize the validity of the statute. The terms of the statute, however, indicate a Congressional intent not to disrupt the state tax systems when the property valuations were completed prior to the effective date of the federal statute.

4. The construction of § 1513 (d)(1)(B) by the Colorado Supreme Court does not render this provision meaningless.

The interpretation of § 1513(d)(1)(B) by the Colorado Supreme Court gives effect to the subsection. The Court notes that the subsection makes "explicit what would otherwise be left only to inference-namely, when a state places a valuation for assessment on air carrier property that is violative of subparagraph (A), the state is prohibited from taking further action to levy or collect any taxes based on the impermissible assessment" . 773 P.2d at 1044. This interpretation of the subsection does not render it meaningless.

Construing Section 1513(d)(1)(B) to only prohibit the levy and collection of taxes based on valuations prohibited by 1513(d)(1)(B) gives effect to all the provisions of Section 1513(d). Subparagraph B permits the levy and collection of taxes on assessments made prior to the effective date of Section 1513(d) regardless of whether the assessments meet the terms of Section 1513(d)(1)(A). Subparagraph B does not permit the levy and collection of taxes on assessments prohibited by Section 1513(d)(1)(A) after the effective date. Section 1513(d)-(1)(B) does not prohibit all tax levies and collections. If Congress intended to prohibit all tax collections then it could have provided that tax jurisdictions are prohibited from collecting *ad valorem* taxes for the valuation of airline property having a higher assessment ratio than other commercial and industrial property. Congress did not so provide. Instead, it only prohibited the levy and collection of taxes based on assessments prohibited by Section 1513(d)(1)(A).

This construction gives effect to Congressional intent. Congress did not intend to disrupt state property tax systems by enacting Section 1513(d) without an effective date. Instead, it intended that Section 1513(d)(1)(B) prohibit the levy and collection of taxes only as to assessments prohibited by Section 1513(d)(1)(A). In our case, the assessments were completed prior to the effective date of the statute and, therefore, the assessments are not prohibited by Section 1513-(d)(1)(A).

The tax authorities disagree with the Petitioners' construction and application of *Trailer Train Co. v. State Board of Equalization*, 511 F. Supp. 553 (1981) affirmed in part and vacated in part 697 F.2d 860 (9th Cir. 1983), cert. den. 464 U.S. 846, (1983). The provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act), codified as 49 U.S.C. Section 11503 are materially different from Section 1513(d). Compare the provisions of the 4-R Act found in *Trailer Train* at page 862, footnote 1 with Section 1513(d).

The portion of the 4-R Act relevant to the decision in *Trailer Train* is 49 U.S.C. Section 11503(c). Section 1513(d) has no provisions comparable to 49 U.S.C. Section 11503(c).

Indeed, in *Trailer Train* the tax officials attempted to apply a higher tax rate to the value of the railroad property than to other industrial and commercial property. The issue in *Trailer Train* was not whether the levy and collection of the tax was prohibited by a provision comparable to Section 1513(d)(1)(B). Admittedly 49 U.S.C. § 11503(b)(2) is virtually identical to Section 1513(d)(1)(B). However, the Court did not interpret Section 11503(b)(2) in *Trailer Train*. The opinion in *Trailer Train* is inapposite to the issue to be determined in our case.

Finally, *Tennessee v. L & N RR.*, 478 F. Supp. 199 (M.D. Tenn. 1979) aff'd 652 F.2d 59 (6th Cir. 1981) cert. den. 454 U.S. 834 (1981) does not have the same factual situation as our case. First, in *L & N RR.* the federal act became effective prior to the valuation of the railroad's property in 1979. *Cf. Arkansas - Best Freight Co. v. Cochran, supra*, decided by the same court during 1981 in a similar case. In Colorado, the Airline property was valued before the effective date of Section 1513(d). Next, in *L & N RR.* Congress provided a three-year period between the enactment of the 4-R Act and its effective date to provide time for compliance by the state legislatures. In our case, Section 1513(d) became effective immediately upon signing by the President and Congress allowed no time for the Colorado General Assembly to comply with the requirements of Section 1513(d) for 1982. Finally, construing Section 1513(d) to be inapplicable solely to the 1982 tax year in Colorado does not frustrate any express Congressional purpose.

5. The application of § 1513(d)(1)(C) by the Colorado Supreme Court does not conflict with federal precedent and the underlying purpose of § 1513(d).

The levy and collection of 1982 Colorado property taxes for airline property is not prohibited by 49 U.S.C.App. § 1513(d)(1)(C). This subdivision of the statute prohibits a state or its subdivision from levying or collecting an "ad valorem tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." The actual tax rate for 1982 in our case was 89.261 mills. This mill levy is the same for all property in Denver including both airline property and other commercial and industrial property. Thus, §

1513(d)(1)(C) does not prohibit the taxes in our case because a uniform tax rate was levied for airline property and other commercial and industrial property.

The Petitioners' proposed construction of § 1513(d)(1)(C) renders § 1513(d)(1)(B) superfluous. Subparagraph (A) prohibits discriminatory assessments, while subparagraph (B) prohibits the levy and collection of taxes based on discriminatory assessments. If, as the Petitioners argue, the term "tax rate" in subparagraph (C) were to be construed to mean the "effective tax rate" resulting from a disparate assessment violative of subparagraph (A), the prohibition of subparagraph (C) would be nothing more than a mere repetition of subparagraph (B). A statute should be interpreted in a manner that gives effect to all its provisions and not in a way that renders any part superfluous.

The Respondents adopt the analysis of the Colorado Supreme Court. 773 P.2d at pages 1044-1045. The Courts' basis for distinguishing *Northern Railroad Co. v. Department of Revenue*, 570 F. Supp. 585 (W.D. Wis. 1983) *modified*, 604 F. Supp. 1575 (W.D. Wis. 1985) is also adopted by the Respondents. 773 P.2d at 1045, fn. 9. The opinion of the Colorado Supreme Court is in accord with the provisions of the federal law.

6. The application of § 1513(d) to the 1982 Colorado Property Tax Year is constitutionally prohibited because such application is destructive of state sovereignty and violates the Tenth Amendment of the United States Constitution.

The Respondents contended in the proceeding below that if the federal statute is applicable to the 1982 Colorado property tax year then the application would constitute an unconstitutional usurpation of state sovereignty in violation of the Tenth Amendment. The Colorado Supreme Court did not address this claim because it held that § 1513(d) did not apply to the 1982 taxes. 773 P.2d at 1039, fn. 6. This claim will be raised as a defense in the event this Court grants the petition for a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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